Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

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PAUL J. NEWTON,

Petitioner,

v.

B. F. GOODRICH COMPANY, ROBERT H. RAU, L. A. CHAPMAN, DIANE C. CREEL, VINCENT N. MARAFINO, ROBERT M. PRICE, SAM F. IACOBELLIS, WILLIAM P. SOMMERS, JAMES R. WILSON, WALLACE BARNES, EUGENE E. COVERT, and D. LARRY MOORE,

Respondents.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

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25 pp

Question Presented

Whether due process rights of a non-resident class member are violated by not giving him the option to opt out of the plaintiffs' class in a case in which damages are sought, and deeming his request to opt out and his objection to the settlement, as amounting to a waiver of personal jurisdiction over him.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

****

PAUL J. NEWTON,

Petitioner,

v.

B. F. GOODRICH COMPANY, ROBERT H. RAU, L. A. CHAPMAN, DIANE C. CREEL, VINCENT N. MARAFINO, ROBERT M. PRICE, SAM F. IACOBELLIS, WILLIAM P. SOMMERS, JAMES R. WILSON, WALLACE BARNES, EUGENE E. COVERT, and D. LARRY MOORE,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

Petitioner Paul J. Newton respectfully prays that this court enter a writ of certiorari to review the order of the Supreme Court of North Carolina denying a petition for writ of certiorari brought by petitioner to review the decision of the North Carolina Court of Appeals, and the decision of the North Carolina Court of Appeals itself, holding that petitioner waived his right to object to jurisdiction over his person, as a non-resident in a class action seeking damages, where he was not given the opportunity to opt

out, on the basis of a docum[illegible]iled by him seeking to opt out and objecting to the settlement.

OPINION BELOW

The decision of the North Carolina Court of Appeals, dated May 15, 2001, and the order of the Supreme Court of North Carolina denying petition for writ of certiorari to review that opinion dated August 16, 2001, are not yet reported. They bear file No. COA00-847, and are included in the appendix.

JURISDICTION

Denial of petition for certiorari by the Supreme Court of North Carolina was entered on August 16, 2001. This is the final decision by the appellate court of last resort of the State of North Carolina. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a) and 28 U.S.C. § 2101(c). See Rule 20.2 of the Rules of the Supreme Court. The state court has decided a question of federal law in a way that conflicts with applicable decisions of the Supreme Court of the United States. Rule 17.1(c) of the Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV, section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved and the Effect thereof.

United States Constitution, Amendment XIV, section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner requests that this court review the order of the Supreme Court of North Carolina on August 16, 2001, refusing to review the decision of the North Carolina Court of Appeals on May 15, 2001, and that decision itself, affirming the dismissal of petitioner's civil action maintained in the Superior Court of Mecklenburg County, North Carolina.

Petitioner filed suit in the Superior Court of Guilford County, North Carolina, on December 21, 1999, against respondent B. F. Goodrich Company and the individual respondents, who are former officers and directors of Rohr, Inc., as a shareholder's derivative action, alleging breach of fiduciary duties by the individual defendants in connection with the merger of Rohr, Inc., into B. F. Goodrich Company.

Respondents filed a motion to dismiss and for change of venue. The action was transferred from Superior Court of Guilford County to Superior Court of Mecklenburg County, North Carolina, by consent of the parties.

Respondents' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure was heard on June 5, 2000. The court entered its order June 13, 2000, granting respondents' motion to dismiss.

Petitioner gave notice of appeal to the North Carolina Court of Appeals on June 22, 2000.

STATEMENT OF THE FACTS

Petitioner's alleged that the individual respondents breached their fiduciary duty to him and to other shareholders of Rohr, Inc., by supporting and voting for the merger of that company into B. F. Goodrich Company, more particularly by (1) not trying to solicit mergers with other companies, which likely would have been available on much more favorable terms than the merger into B. F. Goodrich Company; (2) overcoming the reasonable resistance of a minority of the directors to the merger, by using improper pressures and making misleading statements to cause the dissenting directors to change their votes; (3) obtaining a grossly insufficient consideration for the shares of Rohr, Inc., and failing to require a premium to be paid for these shares in a way that would have been fully supported by the securities markets; (4) bargaining for and accepting two years of full pay and benefits for the corporate officers, despite extremely attractive retirement arrangements recently negotiated by the chief executive officer and the chief financial officer for themselves; (5) arranging for retirement benefits and immediate vesting of stock options triggered by the merger; and (6) making false and misleading statements to the directors and shareholders that there were doubts about the ability of Rohr, Inc., to secure future business and be successful, as well as representing B. F. Goodrich Company to have a highly favorable future and its stock to be underpriced.

Respondents' motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure was solely on the basis of the judgment of the Superior Court of the State of California for the County of San Diego, entered June 18, 1999, approving settlement of two class actions against respondents herein, as well as against Rohr, Inc., being Robert Schippers, etc. v. Rohr, Inc., et al., case No. 714307, and A. Carl Helwig, et al. v. Rohr, Inc., et al, case No. 714512. [Hereinafter, these cases will be referred to as the California state court cases.]

The prayers for relief in the California state court cases sought preliminary and permanent injunction from consummation of the merger; rescission of the merger if it had been completed, and "compensatory damages against defendants. . .arising from the proposed transaction."

Petitioner was never provided with a copy of the order or judgment approving class settlement. He never received any notification from the court, counsel, or anyone concerning the disposition of his effort to opt out of the class. He was never made aware of any right of appeal.

Petitioner is a citizen of North Carolina who resides in Winston-Salem. At no time has he had any connections with the State of California. At no time has he owned any real property, personal property or intangible property, or interests therein, in California. He was physically present in California only once and that was before he had acquired any of his stock in Rohr, Inc. The only notification petitioner received of the California state court cases was a notice of hearing on proposed settlement of class actions, which was sent to him by mail. He was never served with any legal process in the nature of a summons or otherwise, issuing from the California courts.

The notice of hearing did not advise petitioner or the other shareholders that they had any right to opt out of the settlement, and no forms were provided for that purpose. In fact, the notice stated that members of the plaintiff class would not be able to opt out.

Following receipt of the notice of hearing, petitioner prepared a notice of objection of the settlement and a notice of exclusion from the class. In material part, this statement read that petitioner "objects to the proposed settlement described in the Notice of Hearing on the Proposed Settlement of Class Actions" and "requests the Court to exclude him from the class and any

settlement reached through the class actions." He signed this document and mailed it to the Clerk of San Diego County Superior Court in a timely manner.

By filing his notice of objection and notice of exclusion, petitioner was not intending to submit himself to the jurisdiction of the California courts; rather, the purpose of this document was to release him from any binding effect of decisions by those courts.

Petitioner did not accept the exchange of his Rohr, Inc., stock for the stock of B. F. Goodrich Company, nor did he personally tender the stock to be exchanged. He had a margin account with his brokerage firm, and the broker carried out the stock exchange to protect its security interest.

Rohr, Inc., was incorporated under the laws of the State of Delaware. Rohr, Inc., had thousands of shareholders of record, who were located throughout the United States. B. F. Goodrich Company is incorporated under the laws of the State of New York, its principal place of business presently being Charlotte, North Carolina.

The settlement entered into for the plaintiffs' class in the California state court cases was totally without value to the shareholders. They received not one penny of damages for the losses incurred by them as a result of officer and director fiduciary duty violations. The complete settlement consisted only of (1) the investment banker of Rohr, Inc., updating its written opinion and stating again that the merger was fair; (2) Rohr, Inc., issuing a press release reflecting the foregoing statement by the investment banker; (3) Rohr, Inc., mailing to each shareholder the first quarterly report for the 1998 fiscal year; and (4) plaintiffs' class counsel making suggestions as to certain disclosures made in proxy statements (apparently there being no requirement that these suggestions be accepted). Significantly, plaintiffs' class counsel were rewarded legal fees of $385,000.00.

The North Carolina Court of Appeals held in its opinion, which the Supreme Court of North Carolina refused to review, that petitioner waived his constitutional due process rights and submitted his person to the jurisdiction of the California courts, because he filed with a court of that state a statement saying he "objects to the proposed settlement. . . ."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The first point in the litigation at which a federal constitutional question could have emerged was in the documentation and briefing filed by the parties with respect to respondents' motion to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Respondents relied on the California state courts' opinion that a non-opt-out class properly could be certified, and that petitioner and another objector could not properly be excluded from the class because of its non-opt-out nature. (Memorandum in support of approval of settlement and class certification, ¶ III.E., n.4, Record pp.75-76, and final judgment, ¶ 4, Record p.91). In briefing respondents' motion to dismiss in the superior court of Mecklenburg County, both sides submitted legal memoranda and made arguments as to whether or not petitioner could opt out of the California state court cases, consistent with the due process clause of the Fourteenth Amendment. The Superior Court ruled that petitioner's due process rights had not been violated and entered its order dismissing the case.

In the North Carolina Court of Appeals, petitioner argued, and respondents disagreed, that petitioner's due process rights under the Fourteenth Amendment were violated by the disallowance of his motion to opt out in the California state court cases.

The North Carolina Court of Appeals held that the petitioner had waived his due process rights by filing a statement objecting to the proposed settlement. Petitioner's petition for writ of certiorari in the Supreme Court of North Carolina, and respondents' response thereto, dealt extensively with the questions of the presence or lack of a right by petitioner to have opted out of the California state court cases settlement, and whether or not petitioner's filing of a notice objecting to the settlement as well as purporting to opt out, constituted a waiver of his due process rights under the Fourteenth Amendment. In its order denying petitioner's petition for certiorari, the Supreme Court of North Carolina assigned no reason for its decision.

REASONS WHY WRIT SHOULD BE ALLOWED

The courts of one state are not bound by a judgment of another state's courts by the Full Faith and Credit Clause, Article IV, section 1, of the United States Constitution, where there was no personal jurisdiction of the party to the judgment who now challenges it. A person's rights under the due process clause of the Fourteenth Amendment to the United States Constitution are violated, if an out-of-state judgment is enforced against him, when the court rendering it had no jurisdiction over his person. May v. Anderson, 345 U.S. 528, 533 (1953).

With respect to class actions, it remains clear that a state court "may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." Kremer v. Chemical Construction Corp., 456 U.S. 461, 482 (1982).

Plaintiffs in the California state court cases prayed for substantial damages, as well as injunctive relief. When non-party class members are sought to be bound with respect to damage claims in a class action, constitutional due process requires the right to opt out. As this court stated in Phillips Petroleum Co. v. Shutts,

472 U.S. 797, 812 (1985), "[W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."

This court recently reaffirmed the above holding and extended the due process protections applicable to non-resident class members in Ortiz v. Fibreboard Corp., ___ U.S. ___, 119 S.Ct. 2295 (1999). This court reiterated the holding in Shutts that out-of-state plaintiffs must be given at a minimum the right to opt out of a class involving damage claims. 119 S.Ct. 2315. "[M]andatory class actions aggregating damage claims implicated in the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or in which he has not been made a party by service of process,'. . .it being our deep-rooted historic tradition that everyone should have his own day in court,. . ." 119 S.Ct. at 2314-15.

This court's mandate that petitioner be given the right to opt out of a class action including damage claims was disregarded by the California courts. In the absence of being given an opt out right, the class member must either have minimum contacts with the forum state or must consent to jurisdiction, in order to be bound by a class action settlement. In Re Real Estate Title and Settlement Services Anti-Trust Litigation, 869 F.2d 760, 769 (3d Cir. 1989).

Petitioner did not have minimum contact with the State of California. Mere ownership of shares of stock by a non-resident in a corporation which does business in the forum state, is not a sufficient connection to that state to permit personal jurisdiction to be exercised over him. Shaffner v. Heitner, 433 U.S. 186 (1977).

The North Carolina Court of Appeals wrongly held that he consented to jurisdiction of the California courts by the simple act of adding a statement in his notice requesting to be excluded from the class, to the effect that he objected to the settlement.

Had plaintiff not filed a request to opt out, an inference of consent might have been drawn from his silence or inaction after having received notice of the running of the opt out period. Carlough v. Amchem, Inc., 10 F.3d 189, 199 (3d Cir. 1993); Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1561 (3d Cir. 1994).

Filing of the opt out request in and of itself cannot be deemed a submission to the jurisdiction of the foreign court and a waiver of due process rights. This would be wholly inconsistent with this court's holding in Phillips Petroleum Co. v. Shutts. In Re Real Estate Title and Settlement Service Antit-Trust Litigation, supra, 869 F.2d at 770; White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994).

Petitioner did nothing to evince a willingness to submit himself to the jurisdiction of the California courts. The failure to provide him with an opt out form violated this court's mandate in Phillips Petroleum Co. v. Shutts. Therefore, petitioner was left to construct his own. He stated only that he "requests the court to exclude him from the class and any settlement reached through the class actions" and he "objects to the proposed settlement." He did not use the word "objects" in the sense of asking the court to make any rulings on the adequacy of the settlement as it affected him; that term was used only for the purpose of explaining that he wanted to be excluded from the class action, not on account of some whim or caprice, but because he objected to the terms of the settlement.

The North Carolina Court of Appeals improperly and illogically catapulted petitioner's statement that he "objects to the proposed settlement" in explanation of his "request [that] the court. . .exclude him from the class and any settlement", into petitioner's seeking "affirmative relief on the merits."

This court in Phillips Petroleum Co. v. Shutts dealt expressly with the question of when a member of the plaintiff class may consent to the jurisdiction over him of the court presiding over a class action. This court held that consent to jurisdiction could be established by the class member being provided with a request for exclusion that could be returned within a reasonable time. "The interests of the absent plaintiffs are sufficiently protected by the forum State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the court." 472 U.S. at 814.

The due process right not to be bound by the judgment of a court which has no jurisdiction over the party's person is a fundamental constitutional right. "'[C]ourts indulge every reasonable presumption against waivers' of fundamental constitutional rights. . . ." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Petitioner in no way intentionally relinquished his rights not to be bound by the California state judgment, when he filed a statement merely objecting to the proposed settlement. He did not know, and had no reason to know, he was giving up the valuable right not to litigate in a distant forum. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Id.

The decision of the North Carolina Court of Appeals, left in tact by the refusal to review it by the Supreme Court of North Carolina, denies petitioner his right to due process under the Fourteenth Amendment, by granting binding effect to the judgment of the court of another state over his claims, when petitioner had no contacts with the forum state and he was not given an opportunity to opt out of the class action, in violation of this court's prescription

in Phillips Petroleum Co.v. Shutts.

CONCLUSION

For all the reasons stated in the petition for writ of certiorari, petitioner respectfully requests that this court grant the writ of certiorari and that the judgment of the North Carolina Court of Appeals be reversed.

This 19 day of October, 2001.

Respectfully submitted,

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STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 00-CVS-4653

PAUL J. NEWTON,

Plaintiff,

v.

B.F. GOODRICH COMPANY, ROBERT H. RAU, L.A. CHAPMAN, DIANE C. CREEL, VINCENT N. MARAFINO, ROBERT M. PRICE, SAM F. IACOBELLIS, WILLIAM P. SOMMERS, JAMES R. WILSON, WALLACE BARNES, EUGENE E. COVERT and D. LARRY MOORE,

Defendants.

ORDER

This matter coming on to be heard and being heard before the undersigned superior court judge presiding at the June 5, 2000 session of Mecklenburg County Superior Court upon Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and the Court, having considered the memoranda and the arguments of counsel, and having reviewed the materials filed in this action (the parties having stipulated in open court that it was appropriate for the court to consider the materials of public record in Schippers v. Rohr, Inc., et al., San Diego County, California Superior Court Case No. 714307, and the Affidavit of Plaintiff), and being of the opinion that the Motion to Dismiss should be granted.

Now, therefore, it is hereby ordered, adjudged and decreed that Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) be, and the same is hereby, GRANTED, and Plaintiff's Complaint is

dismissed with prejudice.

This the 13th day of June, 2000.

The Honorable Robert P. Johnston

NO COA00-847

NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2001

PAUL J. NEWTON,
Plaintiff-Appellant,

v.

Mecklenburg County
No. 00-CVS-4653

B.F. GOODRICH COMPANY, ROBERT H. RAU, L.A. CHAPMAN, DIANE C. CREEL, VINCENT N. MARAFINO, ROBERT M. PRICE, SAM F. IACOBELLIS, WILLIAM P. SOMMERS, JAMES R. WILSON, WALLACE BARNES, EUGENE E. COVERT and D. LARRY MOORE,
Defendant-Appellees.

Appeal by plaintiff from order entered 13 June 2000 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 24 April 2001.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for plaintiff-appellant.

Kilpatrick Stockton LLP, by Jackson N. Steele, for defendant-appellees.

McGEE, Judge.

Plaintiff filed a complaint on 21 December 1999 alleging that individual defendants breached their fiduciary duties to plaintiff and other shareholders of Rohr, Inc. (Rohr) in the 1998 merger between Rohr and B. F. Goodrich Company. Plaintiff asserted that

he owned 1,101,865 shares of Rohr stock at the time of the merger. In February 2000, defendants moved to dismiss plaintiff's complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that the issues involved in the lawsuit had been previously litigated in a California court. After considering the materials of public record with respect to the California action, the trial court granted defendants' motion to dismiss on 13 June 2000. Plaintiff appeals.

The California action was filed in 1997, in anticipation of the merger, on behalf of all shareholders of Rohr. The action sought to enjoin or, if necessary, rescind the merger, and sought compensatory damages as well. Plaintiff learned of the California action in 1999 when he received a notice of hearing on a proposed settlement of the action. Plaintiff responded by immediately filing with the California court a "Notice of Objection to Proposed Settlement and Notice of Exclusion from the Class," which stated:

1. [Plaintiff] is a citizen and resident of Forsyth County, North Carolina.

2. [Plaintiff] held the common stock of Rohr, Inc. on September 17, 1997.

3. [Plaintiff's] first notice of the class action from the attorneys of record was the pleading entitled, Notice of Hearing on the Proposed Settlement of Class Actions, filed in this action.

4. [Plaintiff] objects to the proposed settlement described in the Notice of Hearing on the Proposed Settlement of Class Actions.

5. [Plaintiff] requests the Court to exclude him from the Class and any settlement reached through the class actions.

The California court approved the settlement on 21 July 1999 and held that it bound everyone in the class of former shareholders of Rohr.

Plaintiff asserts that the California court never gained personal jurisdiction over him, and therefore that he cannot be bound by the settlement in the California action. Defendants argue that by formally objecting to the proposed settlement, plaintiff submitted to the jurisdiction of the California court and cannot now collaterally challenge its judgment in the present North Carolina action. In California,

> "A general appearance by a party is equivalent to personal service of summons on such party." The statutory list of acts constituting an appearance ([filing an answer, demurrer, motion to strike, etc.]) is not exclusive; "rather the term may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. What is determinative is whether [the party[takes a part in the particular action which in some manner recognizes the authority of the court to proceed."

Hamilton v. Asbestos Corp., 998 P.2d 403, 415 (Cal. Sup. Ct. 2000) (Citations omitted).

In no part of his filing with the California court did plaintiff challenge that court's jurisdiction over him.

> It is a long-standing rule that, if the moving party does not confine herself to the objection of lack of jurisdiction over her person, but seeks affirmative relief on the merits, her application may be deemed a general appearance regardless of its designation.

In re Marriage of Torres, 73 Cal. Rptr. 2d 344, 353 (1st Dist. 1998). We hold that by formally objecting to the proposed settlement in the California action, plaintiff sought affirmative relief

on the merits and therefore made a general appearance under California law, submitting himself to that court's jurisdiction. In both California and North Carolina, a court may exercise jurisdiction over a person who makes a general appearance in an action. See Cal. Code Civ. Proc. § 410.50(a); N.C. Gen. Stat. § 1-75.7(1) (1999). Insofar as the California court accepted the class action settlement and declined to permit plaintiff to opt out of the class, plaintiff's sole recourse is through the California appellate courts. Our Supreme Court has held that "[a] collateral attack may not be made upon a judgment rendered by a court of competent jurisdiction." *Smith v. Smith*, 334 N.C. 81, 86, 431 S.E.2d 196, 199 (1993). Plaintiff is prohibited from collaterally attacking the California judgment in the present action.

We affirm the trial court's dismissal of plaintiff's complaint.

Affirmed.

Judges GREENE and CAMPBELL concur.

Report per Rule 30(e).

No. 328P01 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Newton v. B.F. Goodrich Co., et al)

PAUL J. NEWTON

v.

B.F. GOODRICH COMPANY, ROBERT H. RAU, L.A. CHAPMAN, DIANE C. CREEL, VINCENT N. MARAFINO, ROBERT M. PRICE, SAM F. IACOBELLIS, WILLIAM P. SOMMERS, JAMES R. WILSON, WALLACE BARNES, EUGENE E. COVERT, and LARRY MOORE

From NC Court of Appeals
(C0A00-847)
From Mecklenburg
(00CVS4653)

****

ORDER

Upon consideration of the petition filed by Plaintiff in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 16th day of August 2001.

s/Butterfield, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of August 2001.

Christie Speir Cameron
Clerk, Supreme Court
of North Carolina

Copy to:
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Mr. Ralph A. White, Appellate Court Reporter
Mr. Norman B. Smith, Attorney for Paul J. Newton
Mr. Jackson N. Steele, Attorney for B.F. Goodrich, et al.
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